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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

3 JONATHAN GABRIELLI, an individual, on
4 behalf of himself, the general public, and those
similarly situated.

Plaintiff,

V.

MOTOROLA MOBILITY LLC,

Defendant.

Case No. 4:24-cv-09533-JST

**MOTOROLA MOBILITY LLC'S
NOTICE OF MOTION AND MOTION
TO STRIKE THE CLASS
ALLEGATIONS IN THE
COMPLAINT; MEMORANDUM OF
POINTS AND AUTHORITIES**

[Assigned to the Honorable Jon S. Tigar]

Hearing Date: May 22, 2025
Time: 2:00 p.m.
Courtroom: 6

Complaint Filed: December 31, 2024

1 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 22, 2025, at 2:00 p.m., or as soon thereafter as this
 3 matter may be heard by the Honorable Jon S. Tigar in Courtroom 6, 2nd Floor, of the above-entitled
 4 Court located at 1301 Clay Street, Oakland, California, 94612, Defendant Motorola Mobility LLC
 5 (“Motorola”) will, and hereby does, move to strike portions of the Class Action Complaint
 6 (“Complaint”) of Plaintiff (“Plaintiff”), individually and on behalf of all others similarly situated,
 7 and each claim asserted therein against Motorola.

8 Pursuant to Federal Rule of Civil Procedure¹ 12(f), Motorola moves to strike Plaintiff’s
 9 class allegations on the grounds that the putative class is not capable of being certified. Specifically,
 10 (1) no class member has Article III standing; (2) Plaintiff and the other purported class members
 11 agreed to waive their class claims; (3) on the face of the Complaint, Plaintiff cannot satisfy the
 12 requirements of Rule 23(a) and (b); and (4) the class period, as defined, exceeds the applicable
 13 statutes of limitations.

14 This Motion is based on this Notice of Motion and Motion to Strike, Memorandum of Points
 15 and Authorities, Declaration of Jonathan Coleman (“Coleman Declaration”) and exhibits thereto,
 16 Request for Judicial Notice (“RJN”), concurrently filed Motion to Dismiss with Prejudice, and all
 17 pleadings, arguments, and matters before the Court.

18 Dated: March 3, 2025

19 K&L GATES LLP

20 By: /s/ Zachary T. Timm
 21 Paul W. Sweeney, Jr.
 22 Zachary T. Timm
 23 Johnathan A. Coleman

24 Attorneys for Defendant
 25 Motorola Mobility LLC

26
 27
 28 ¹ Subsequent citations or references to the “Rules” shall refer to the Federal Rules of Civil
 Procedure.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 As set forth in Motorola’s concurrently filed Motion to Dismiss Plaintiff’s Complaint, the
4 Complaint should be dismissed in its entirety because: (1) Plaintiff has not, and cannot, allege a
5 concrete injury-in-fact to support Article III standing; (2) Motorola is not subject to personal
6 jurisdiction; and (3) the Complaint fails to state facts to support any of the alleged claims. That
7 notwithstanding, in the event this Court is disinclined to grant Motorola’s Motion to Dismiss in its
8 entirety and any portion of the Complaint survives—which it should not—certain portions of the
9 Complaint should be stricken. Specifically, Plaintiff’s class allegations are fatally flawed in a
10 manner that cannot be repaired through discovery, and so should be stricken.

11 *First*, no members of the putative class have standing to bring the claims alleged in the
12 Complaint.

13 *Second*, Plaintiff and each of the putative class members waived their ability to bring the
14 claims alleged in the Complaint on a class-wide basis.

15 *Third*, on the face of the Complaint, the putative class cannot meet the requirements of Rule
16 23(a) and (b). Plaintiff cannot satisfy the numerosity requirement of Rule 23(a). Further, individual
17 issues will predominate, rendering the class un-certifiable under Rule 23(b).

18 *Fourth*, the alleged definition of the “Class Period” extends beyond the applicable statutes
19 of limitations for nearly all of the claims alleged, and therefore must be stricken to comport with
20 such limitations.

II. FACTUAL BACKGROUND²

22 According to the Complaint, Motorola is a Delaware company with its principal place of
23 business in Illinois. (DE 1 (Complaint), ¶ 7.) Motorola specializes in electronics, including
24 smartphones and other mobile devices. (*Id.*, ¶ 20.) Motorola owns and operates a website at
25 www.motorola.com (the “Website”). (*Id.*, ¶ 1.) When consumers visit Motorola’s website, a
26 consent banner/popup is immediately and conspicuously displayed, which informs visitors that

² Motorola disputes the allegations in Plaintiff's Complaint but recognizes certain facts may be taken as true at this stage, and so recites the relevant facts alleged here.

1 Motorola uses certain cookies and similar technologies, presents visitors with Motorola's privacy
 2 statement, and informs visitors that by continuing to browse the Website or clicking the "X" they
 3 agree to the terms. (*Id.*, ¶ 23.) This pop-up window invites users to "Click Here to Reject All non-
 4 essential cookies." (*Id.*; *see also* RJN Ex. A.) This tool explains to visitors that Motorola relies on
 5 third-party partners to track and record certain actions and behaviors including, *inter alia*, including
 6 page views, IP address, and clickstream data. (*Id.*)

7 The pop-up window also invites users to visit Motorola's "Website Privacy Statement" for
 8 additional information. (DE 1, ¶ 23.) This Privacy Statement makes clear that Motorola collects
 9 information about visitors to its Website—including user activity on Motorola's website—and that
 10 such information is maintained by Motorola and its service providers and partners. (RJN Ex. A.)
 11 Further, this privacy policy instructs users "that certain Motorola websites may not respond to Do-
 12 Not-Track signals sent by certain browsers" and informs them of alternative measures users may
 13 take to ensure their privacy. (*Id.*)

14 The Privacy Statement presented in this popup is one portion of the Motorola's "Terms of
 15 Use" (the "TOU"), which, when reviewed holistically, governs a visitor's use of the Website, and
 16 forms the basis of the relationship between Motorola and those visitors. (DE 1, at ¶ 162; *see also*,
 17 RJN Ex. B.) In addition to the Privacy Statement incorporated by reference into the Complaint, the
 18 TOU also includes several other important terms governing Motorola's relationship with visitors
 19 to its Website, which the visitors agree to by continuing to use Motorola's Website. Those terms
 20 include, among others, a class action waiver, a venue selection provision identifying Chicago, IL,
 21 as the proper venue for adjudication of any claims arising in connection with Plaintiff's website
 22 usage, and the governing law governing any dispute to be the law of Illinois. (*See*, RJN, at Ex. B.)

23 Plaintiff alleges that he visited Motorola's website on multiple occasions over the course of
 24 the last four years, including, in or around February 2022, December 2022, November 2023, and
 25 January 2024. (DE 1, ¶ 70.) Plaintiff alleges that he entered into an agreement with Motorola
 26 governing his use of the Website. (*Id.*, ¶¶ 161-179.) Plaintiff alleges that, after being presented
 27 with the aforementioned popup, he selected and clicked the "Reject All non-essential cookies" link.
 28 (*Id.*, at ¶ 72.) Plaintiff alleges that he then proceeded to use the Website and that, despite clicking

1 the “Reject All” button, cookies and other tracking technologies continued to be placed on his
 2 device. (*Id.*, at ¶ 75.) Plaintiff does not allege that Motorola intentionally tracked or recorded his
 3 information after he clicked the “Reject All” button; nor does he allege, because he cannot in good
 4 faith do so, that said tracking or recording was not the result of a bona fide error or mistake.

5 Plaintiff alleges that he transmitted electronic communications to Motorola’s computer
 6 servers utilized to operate the website, and that Motorola violated its TOU by allegedly allowing
 7 third-party software to continue to track Plaintiff after Plaintiff’s rejection of the collection of
 8 communications. (*Id.* ¶¶ 15, 31-33.).)

9 **III. ISSUES TO BE DECIDED (CIV. L.R. 7-4(A)(3))**

10 A. Whether the class allegations in the Complaint should be stricken for lack of standing;
 11 B. Whether Plaintiff and the putative class members waived their ability to bring the alleged
 12 claims on a class wide basis;

13 C. Whether the class allegations in the Complaint should be stricken because Plaintiff will
 14 never be able to meet the requirements of Rule 23 (a) and (b); and

15 D. Whether the class allegations in the Complaint, and particularly the class definition,
 16 should be stricken for exceeding the applicable statutes of limitations.

17 **IV. LEGAL STANDARD**

18 Pursuant to Rule 12(f), a “court may strike from a pleading an insufficient defense or any
 19 redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). Although
 20 disfavored when used for the purposes of delay, “[t]he function of a 12(f) motion to strike is to
 21 avoid the expenditure of time and money that must arise from litigating spurious issues by
 22 dispensing with those issues prior to trial.” *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970,
 23 973 (9th Cir. 2010) (citation omitted). Accordingly, “a court may grant a motion to strike class
 24 allegations if it is clear from the complaint that the class claims cannot be maintained.” *Moon v.*
 25 *Cnty. of Orange*, No. SACV19258JVS/ESX, 2020 WL 2332164, at *2 (C.D. Cal. Mar. 18, 2020)
 26 (striking class allegations relating to a violation of CIPA); *see also Langan v. United Servs. Auto.*
 27 *Ass’n*, 69 F. Supp. 3d 965, 988 (N.D. Cal. 2014) (recognizing that class allegations may be stricken
 28 “when the face of the complaint shows conclusively that the proposed class cannot be certified,”

1 and granting motion to strike class allegations); *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990
 2 (N.D. Cal. 2009) (“Where the complaint demonstrates that a class action cannot be maintained on
 3 the facts alleged, a defendant may move to strike class allegations prior to discovery.”) Indeed,
 4 striking facially uncertifiable class allegations that discovery cannot resolve at the pleadings stage
 5 is particularly important, as to allow such claims to stand “would inject significant uncertainty as
 6 to the scope of discovery and other pre-trial proceedings.” *Yagman v. Allianz Ins.*, No.
 7 LACV1500921JAKJCX, 2015 WL 5553460, at *4 (C.D. Cal. May 11, 2015).

8 **V. ARGUMENT**

9 **A. The Class Allegations Should be Stricken**

10 Plaintiff seeks to define the class in this lawsuit as follows:

11 “All persons who browsed the Website in the State of California after clicking the “Reject
 12 All” button in the popup cookies consent banner within the four years preceding the filing
 13 of the Complaint.”

14 (DE 1, ¶78.) On its face, this class is not viable.

15 1. The putative class cannot be certified for lack of Article III standing

16 “Every class member must have Article III standing in order to recover individual
 17 damages.” *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Courts evaluate standing in
 18 class claims differently depending on whether a claim provides for injunctive relief or not. “[I]n
 19 cases seeking injunctive or declaratory relief, only one plaintiff need demonstrate standing to satisfy
 20 Article III.” *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 682
 21 fn. 32 (9th Cir. 2022) But where no injunctive relief is available, “[N]o class may be certified that
 22 contains members lacking Article III standing.” *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594
 23 (9th Cir. 2012), (*overruled by Olean Wholesale Grocery Coop.*, 31 F.4th at fn. 32 on the grounds
 24 that only one plaintiff needs to demonstrate standing *for injunctive or other equitable relief*, but
 25 expressly noting *Maza* otherwise remains good law).

26 Only one of Plaintiff’s claims—Claim 3 for violations of CIPA § 631—purports to seek
 27 injunctive relief. Consequently, Plaintiff’s other eight causes of action are governed by *Mazza*,
 28 requiring allegations that all putative class members have standing to support those claims. Even

1 Plaintiff's § 631 claim, though, requires all putative class members to have standing, as injunctive
2 relief is not an available remedy.³ Regardless of the standard used, however, the class allegations
3 must be stricken because *no* putative class member has Article III standing.

a. *The class allegations as to § 631 must be stricken*

5 In order for the class allegations to survive with respect to § 631, the Complaint needs to
6 establish that at least one member of the putative class has standing to pursue the § 631 claim, and
7 that injunctive relief is available for such claim. The Complaint fails on both accounts.

To establish the Court’s subject matter jurisdiction at this stage, the Complaint must clearly allege facts demonstrating each element of Article III standing: (i) that a class member suffered an injury that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by Motorola; and (iii) that the injury would likely be redressed by judicial relief. *See Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 523 (9th Cir. 2023) (citations omitted). As more fully set forth in the Motion to Dismiss, which is expressly incorporated by reference herein, the Complaint fails to state facts sufficient to establish that either Plaintiff or any putative class member has suffered an injury-in-fact as a result of the alleged violation of § 631, and therefore no putative class member has standing and the class claims must be stricken. *See, e.g., Muha v. Experian Information Solutions, Inc.*, 106 Cal. App. 5th 199, 209-10 (2024); *see also, Rodriguez v. Fountain9, Inc.*, No. 24STCV04504, 2024 WL 4905217, at *4 (Cal.Super. Nov. 21, 2024) (holding “Plaintiff’s allegation of injury still fails to meet the ‘concrete’ injury required for standing. The alleged injury is abstract and hypothetical because it is solely premised on statutory damages under CIPA,” and sustaining the demurrer without leave to amend.); *Dana Huges v. Vivint, Inc., et al.*, Case No. 2:24-cv-03081-GW-KS, Dkt. 18 (C.D. Cal. July 12, 2024) (Hon. George H. Wu) (striking class allegations and dismissing plaintiff’s complaint in a CIPA action where the complaint failed to allege specifically *what* information was captured by the alleged trap and trace process, and *how* such capture caused her a concrete injury, thereby failing to allege Article III standing). In fact, Plaintiff Jonathan Gabrielli himself just had a similar complaint he filed in the Southern District of

1 New York dismissed, with prejudice, for lack of standing. *JONATHAN GABRIELLI, individually*
 2 *& on behalf of all others similarly situated, Plaintiff, v. INSIDER, INC., Defendant.*, No. 24-CV-
 3 01566 (ER), 2025 WL 522515, at *8 (S.D.N.Y. Feb. 18, 2025) (dismissing, with prejudice, claims
 4 for public disclosure of private facts, intrusion upon seclusion, unjust enrichment, and violations of
 5 CIPA § 638.51 for lack of standing.)

6 What's more, even if Plaintiff's claims survive Motorola's Motion to Dismiss and the
 7 instant Motion and eventually prevail, this action will not result in an injunction. CIPA allows a
 8 plaintiff to "bring an action to enjoin and restrain any violation of this chapter." Cal. Pen. Code §
 9 637.2(b). "A plaintiff is not automatically entitled to an injunction simply because it proves its
 10 affirmative claims." *PepsiCo, Inc. v. California Sec. Cans*, 238 F. Supp. 2d 1172, 1177 (C.D. Cal.
 11 2002); *citing Pyrodyne Corp. v. Pyrotomics Corp.*, 847 F.2d 1398, 1402 (9th Cir. 1988). "To
 12 establish standing for prospective injunctive relief, a plaintiff may not rely solely on [p]ast exposure
 13 to illegal conduct. Instead, a plaintiff must demonstrate continuing, present adverse effects from
 14 the defendant's illegal conduct, *id.*, or that the plaintiff has suffered or is threatened with a concrete
 15 and particularized legal harm coupled with a sufficient likelihood that he will again be wronged in
 16 a similar way." *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806, at *15 (N.D.
 17 Cal. Sept. 23, 2016) (citations omitted). The Complaint fails to allege any continuing wrongful
 18 conduct by Motorola and only speculation by Plaintiff about theoretical harm that might occur in
 19 the future (DE 1, ¶ 77), and so, on the face of the Complaint, injunctive relief is not available.

20 As such, *even if* the Complaint alleged that a putative class member has standing,
 21 generally—which it does not—the class allegations as to the § 631 claim are not governed by the
 22 "injunctive/equitable relief" standing exception identified in *Olean Wholesale Grocery Coop., Inc.*,
 23 but rather should be considered under the general rule that "[N]o class may be certified that contains
 24 members lacking Article III standing" as established in *Mazza*.

25 *b. The class allegations as to the remaining claims must be stricken*

26 For the claims that do not seek injunctive relief, there is a split of authority on *how many*
 27 uninjured class members there can be before certification cannot be allowed. Several circuits,
 28 including at least the Second Circuit and Eighth Circuit, require *all* members of a putative class to

1 have Article III standing, and will refuse to certify a class where *any* member lacks such standing.

2 *See, e.g., Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (“no class may be certified

3 that contains members lacking Article III standing,” and noting any “class must therefore be defined

4 in such a way that anyone within it would have standing.”); *see also Halvorson v. Auto-Owners*

5 *Life Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (“In order for a class to be certified, each member

6 must have standing and show an injury in fact that is traceable.”). Other circuits, such as the First

7 Circuit and D.C. Circuit, reject class certification where more than a *de minimis* number of the

8 putative class members lack standing. *See, e.g., In re Rail Freight Fuel Surcharge Antitrust Litig.*,

9 934 F.3d 619, 624 (D.C. Cir. 2019) (Recognizing that “common proof covering ‘virtually all’

10 members of the proposed class, and leaving only a ‘*de minimis*’ number of cases requiring

11 individualized proof of injury and causation, would be enough to show predominance.”); *see also*

12 *In re Asacol Antitrust Litig.*, 907 F.3d 42, 53-54 (1st Cir. 2018) (reversing the grant of class

13 certification where more than a *de minimis* number of class members suffered no injury). While a

14 third group—which includes the Ninth Circuit—has taken a more permissive approach. *See, e.g.,*

15 *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (“In a class action, standing

16 is satisfied if at least one named plaintiff meets the requirements.”); *but see, Olean Wholesale*

17 *Grocery Coop., Inc.*, 31 F.4th at 669, 682, fn. 14 (stating that “a court must consider whether the

18 possible presence of uninjured class members means that the class definition is fatally overbroad,”

19 and that “[a] district court is in the best position to determine whether individualized questions,

20 including those regarding class members’ injury, will overwhelm common ones and render class

21 certification inappropriate under Rule 23(b)(3),” but declining to consider whether “the possible

22 presence of a large number of uninjured class members raises an Article III issue” because plaintiffs

23 established that “all class members have standing.”) In light of this split, the Supreme Court

24 recently granted a petition for a writ of certiorari on the question of “[w]hether a federal court may

25 certify a class action pursuant to Federal Rule of Civil Procedure 23(b)(3) when some members of

26 the proposed class lack any Article III injury.” *See Laboratory Corporation of America Holdings,*

27 *dba Labcorp, v. Luke Davis, et. al.* Case No. 24-304. This petition arose out of a Ninth Circuit

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1 decision, and will have a significant impact on the issue of how Article III standing, or lack thereof,
 2 is viewed in class action cases moving forward.

3 It does not matter which standard is applied in the instant matter, because the Complaint
 4 fails to meet any of the above. Specifically, the Complaint fails to allege that *any* putative class
 5 member (whether Plaintiff or anyone else) has Article III standing, and so fails to satisfy even the
 6 most permissive view of standing. As discussed in the Motion to Dismiss, the Complaint simply
 7 fails to allege any putative class member suffered a concrete injury-in-fact.

8 Because the Complaint fails to allege Article III standing as to any of the alleged claims,
 9 and because no amount of discovery can cure such defect, the class allegations should be stricken.

10 2. The class allegations should be stricken, because Plaintiff and the putative
 11 class members agreed their claims must be brought on an individual basis

12 The Complaint alleges that Plaintiff's and the putative class members' use of Motorola's
 13 Website was governed by a written agreement. (*See, e.g.*, DE 1, ¶¶ 161-179.) As further discussed
 14 in Motorola's Motion to Dismiss, which is incorporated hereinto, if Plaintiff establishes such a
 15 written contract existed, California law dictates that *all* portions of that agreement must be
 16 considered. *See, e.g.*, *Nish Noroian Farms v. Agric. Lab. Rels. Bd.*, 35 Cal. 3d 726, 735 (1984) ("A
 17 written instrument must be construed as a whole, and multiple writings must be considered together
 18 when part of the same contract.") (*citing* Cal. Civ. Code §§ 1641-1642); *see also Language Line*
 19 *Servs., Inc. v. Language Servs. Assocs., LLC*, No. C 10-02605 JW, 2011 WL 13153247, at *7 (N.D.
 20 Cal. Mar. 17, 2011) ("[w]here a writing refers to another document, that other document becomes
 21 constructively a part of the writing, and in that respect the two form a single instrument.").

22 One such writing that comprises any such contract is the Motorola Terms of Use ("TOU"),
 23 which include a class action waiver. Specifically, pursuant to the TOU, Plaintiff and the putative
 24 class members agreed that "ANY AND ALL DISPUTES, CLAIMS, AND CAUSES OF ACTION
 25 ARISING OUT OF OR CONNECTED WITH THIS SITE AND/OR THESE TERMS, WILL BE
 26 RESOLVED INDIVIDUALLY, WITHOUT RESORT TO ANY FORM OF CLASS ACTION."
 27 (See RJN, Ex. B.) Because Plaintiff and the putative class members have all agreed their claims
 28 shall be resolved individually, they cannot pursue this class action lawsuit.

1 Moreover, even if Plaintiff does not establish that a written contract existed, he and the
2 remaining putative class members are still subject to the class action waiver, and so the class claims
3 should still be stricken. To determine whether a website visitor consented to terms of use on a
4 website—where “consent can be [express] or implied”—courts evaluate whether a “reasonable
5 user” would understand what they are consenting to. *Calhoun v. Google, LLC*, 113 F.4th 1141,
6 1147-49 (9th Cir. 2024). Here, The TOU specifically directs a Website visitor to “***read these Terms
of Use (“Terms”) carefully before using this web site. If you do not agree to these Terms, then
please do not use this site.***” and specifies the Website is provided to visitors “subject to these
7 Terms.” (RJN, Ex. B) (emphasis in original). A “reasonable user” would certainly understand the
8 provisions of the TOU. Further, given Plaintiff’s allegation that his use of the Website was
9 governed by certain agreements, in addition to his status as a repeat-plaintiff in website privacy
10 cases, he knew (or at least should have known) that the TOU governed his browsing experience.
11
12

3. The putative class cannot be certified because, on its face, it cannot meet the requirements of Rule 23 (a) and (b)

a. *Numerosity does not exist*

16 “The class action is an exception to the usual rule that litigation is conducted by and on
17 behalf of the individual named parties only.” *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013)
18 (citation omitted). As such, “[t]o come within the exception, a party seeking to maintain a class
19 action “must affirmatively demonstrate his compliance with Rule 23.” *Id.* (citation omitted). One
20 such requirement set forth by Rule 23 (a)(1) is that a prerequisite to certifying a class is the need to
21 demonstrate “the class is so numerous that joinder of all members is impractical.” *See*, Fed. R. Civ.
22 P. 23(a)(1). However, no such showing could be made here for the simple reason that, as addressed
23 above and in the concurrently filed Motion to Dismiss, neither Plaintiff nor any putative class
24 members suffered any concrete injury-in-fact, and therefore lack standing. Because Plaintiff—let
25 alone any putative class members—does not have standing, the class size is zero people.

26 Even if that were not the case, Plaintiff is still unable to satisfy the numerosity requirement
27 of Rule 23(a). The entire premise of Plaintiff's case is that he clicked a "Reject All" button, it was
28 not functioning properly, and therefore certain cookies were still loaded onto his device. If the

1 “Reject All” button was not working, how could Plaintiff ever show that a putative class of
2 consumers clicked the button and continued to browse the Motorola website? Plaintiff has not even
3 posited the type of evidence that would be available to show that individuals (other than Plaintiff
4 himself) clicked the “Reject All” button and continued to browse the website. It is counter-intuitive
5 to believe it can be done.

6 Plaintiff has alleged that “he estimates that [the class] is composed of more than 100
7 persons,” but does so in a conclusory manner devoid of any factual or logical reasoning. Plaintiff
8 does not, for example, allege the average Website traffic. Nor the length of time the “Reject All”
9 button was allegedly not functioning properly. Nor the number of people who purportedly clicked
10 the “Reject All” button during that time. Rather, Plaintiff has alleged a putative class defined as
11 visitors to the Website while the “Reject All” button was not functioning properly, who reviewed
12 the Privacy Statement and other policies governing their use of the Website, clicked the “Reject
13 All” button, continued to utilize the Website, during which they were allegedly subjected to certain
14 cookies and other similar technologies, which caused them harm. The set of circumstances involved
15 to form this putative class render it difficult to determine if the allegations describe anyone in
16 addition to Plaintiff (and in fact, not even Plaintiff satisfies the definition as he has not been injured).
17 Because the face of the Complaint belies a finding of numerosity, the class allegations should be
18 stricken.

21 Another requirement under Rule 23(b)(3) is that “the questions of law or fact common to
22 class members predominate over any questions affecting only individual members.” The Complaint
23 alleges Plaintiff and the putative class members are all subject to the Website’s policies. (See, e.g.,
24 DE 1, at ¶ 162.) To the extent, however, any class member believes they are *not* subject to the TOU
25 as Plaintiff has alleged, an individual inquiry must then be conducted to determine whether or not
26 that specific putative class member did in fact agree to be bound by the TOU. This individual
27 inquiry would be necessary to determine if a specific individual may continue as part of the putative
28 class, or if they have waived such ability and are required to pursue an individual action. Because

this is a fundamental and gate keeping inquiry, allowing the class allegations to stand would be likely to result in extraordinary discovery efforts, including deposing every putative class member.

c. *The fraud and misrepresentation claims will never be appropriate for certification because individual questions will predominate*

The Complaint's claim for fraud is similarly dependent on individual questions. Plaintiff's claim for fraud and/or misrepresentations is based upon the allegations that the putative class members knew what the "Reject All" button did, that the putative class members clicked that "Reject All" button in reliance on Motorola's purported statements, that the "Reject All" button was not properly functioning, that the putative class members would not have used the Website if he knew the "Reject All" button was not functioning properly, and that the putative class members have been damaged by the improper functioning. (See DE 1, ¶¶ 139-150.) Naturally, however, there will be varying levels of knowledge and reliance with respect to the alleged misrepresentation at issue in this case. Some Website visitors may not have cared about the "Reject All" button and/or whether it was functioning as it would not have impacted their use of the Website, for example. To the extent, the button was not functioning as anticipated as alleged in the Complaint, some may believe "no harm, no foul" in these circumstances. For each of these sub-classes, individual issues of knowledge, reliance, and damages will predominate over individual issues, and thus class certification is not possible.

B. The Class Definition Should be Stricken Because it is Contrary to Established Statutes of Limitations

Courts often strike allegations of class members whose claims are clearly time barred. *See, e.g., Enoch v. Hewlett Packard Enter. Co.*, No. 17-CV-04212-BLF, 2018 WL 3377547, at *15 (N.D. Cal. July 11, 2018) (granting motion to strike and requiring plaintiffs to “amend their overbroad class definition for their race discrimination claims to exclude individuals . . . who suffered injuries outside of the four year statute of limitations period under Section 1981); see also, Ramirez v. Baxter Credit Union, No. 16-CV-03765-SI, 2017 WL 1064991, at *8 (N.D. Cal. Mar. 21, 2017) (“A proposed class period dating back to August 15, 2010 [where lawsuit was filed on July 5, 2016] for a cause of action with a one-year limitations period is facially invalid.”); *Shabaz v. Polo Ralph*

1 *Lauren Corp.*, 586 F. Supp. 2d 1205, 1211 (C.D. Cal. 2008) (same); *May v. Google LLC*, No. 24-
 2 CV-01314-BLF, 2024 WL 4681604, at *9 (N.D. Cal. Nov. 4, 2024) (analyzing the applicable
 3 statutes of limitations on each of plaintiffs' claims and striking class allegations "to the extent that
 4 they encompass periods beyond those permitted by the statutes of limitations.")

5 Here, the Complaint alleges nine separate claims, each with their own statutes of limitations
 6 ranging from one year to four years. Specifically, Plaintiff's privacy-related claims for invasion of
 7 privacy (Claim 1) and intrusion upon seclusion (Claim 2) are each subject to a two-year statute of
 8 limitations. *See, e.g., Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 624 (N.D. Cal. 2021) (*citing*
 9 Cal. Code Civ. Proc. § 335.1). Plaintiff's claims for violations of § 631 (Claim 3) and § 638.51
 10 (Claim 4) of CIPA are both subject to a one-year statute of limitations, with each alleged violation
 11 being subject to its own statute of limitations. *Id.*, at 624-25 (*citing Bliss CoreCivic, Inc.*, 978 F.3d
 12 1144, 1148 (9th Cir. 2020)). Plaintiff's claim for common law fraud, deceit and/or misrepresentation
 13 (Claim 5) is subject to a three-year statute of limitations. *See* Cal. Code Civ. Proc. § 338(d).
 14 Plaintiff's claim for unjust enrichment, which is based upon alleged misrepresentations (Claim 6)
 15 is likewise subject to a three-year statute of limitations. *See, e.g., Sprint Sols., Inc. v. Thirty-One*
 16 *Echo, Inc.*, No. 5:15-CV-02439-EJD, 2018 WL 1510210, at *4 (N.D. Cal. Mar. 27, 2018).
 17 Plaintiff's claims for breach of an alleged written contract (Claim 7) and breach of implied covenant
 18 of good faith and fair dealing relating to that written contract (Claim 8) are subject to a four-year
 19 statute of limitations. *See* Cal. Code Civ. Proc. § 337. Finally, Plaintiff's claim for trespass to
 20 chattels (Claim 9) is subject to a three-year statute of limitations. *See* Cal. Code. Civ. Proc. § 338(b).

21 Plaintiff defines the "Class" to be "All persons who browsed the Website in the State of
 22 California after clicking the 'Reject All' button in the popup cookies consent banner within the four
 23 years preceding the filing of this Complaint," which occurred on December 31, 2024. (DE 1, ¶ 78.)
 24 As clearly outlined above, however, that purported "Class Period" far exceeds the applicable
 25 statutes of limitations for all claims except the two contract-based claims. As such, the putative
 26 class is facially overbroad and all class allegations inconsistent with the applicable statutes of
 27 limitations must be stricken and the "Class" definition must be amended.

28 Similarly, because claims under CIPA are subject to a one-year statute of limitations, neither

1 Plaintiff nor the any putative class members can be allowed to pursue even statutory damages for
 2 alleged violations that occurred prior to December 31, 2023.

3 **C. The Court Should Not Delay Consideration of These Issues Until the
 4 Certification Stage**

5 “Pursuant to Rule 23(c), ‘the court must—at an early practicable time—determine by order
 6 whether to certify the action as a class action.’” *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990
 7 (N.D. Cal. 2009) (quoting Fed. R. Civ. P. 23(c)(1)(A)). When, as here, it is apparent on the face of
 8 the Complaint that class certification would be improper, it is appropriate to strike the class claims
 9 via a 12(f) motion. *See, e.g., Moon*, 2020 WL 2332164, at *2 (C.D. Cal. Mar. 18, 2020); *see also*
 10 *Langan*, 69 F. Supp. 3d at 988. This is true as to striking claims in their entirety, as well as striking
 11 portions of claims to ensure compliance with the applicable statutes of limitations. *See, e.g., May*,
 12 2024 WL 4681604, at *9. Allowing the class allegations to stand here would be highly prejudicial
 13 to Motorola, which would need to defend against uncertifiable class allegations through discovery,
 14 and would run contrary to both Rule 23 and Rule 12(f). *See, e.g., Whittlestone, Inc.*, 618 F.3d at
 15 973 (“[t]he function of a 12(f) motion to strike is to avoid the expenditure of time and money that
 16 must arise from litigating spurious issues by dispensing with those issues prior to trial.”)

17 **VI. CONCLUSION**

18 For the foregoing reasons, Motorola’s Motion to Strike should be granted, and the class
 19 allegations should be stricken in their entirety. Or, if this Court is disinclined to strike them in their
 20 entirety, the class allegations should be stricken where inconsistent with the applicable statutes of
 21 limitations.

22 Dated: March 3, 2025

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